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No. 90-1517

In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF OHIO, ET AL., CROSS-PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE DEPARTMENT OF ENERGY

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QUESTIONS PRESENTED

1. Whether the federal facilities provision of the Resource Conservation and Recovery Act (RCRA), § 6001, 42 U.S.C. 6961, waives the sovereign immunity of the United States from assessment of civil penalties under state hazardous waste laws.

2. Whether the citizen suit provision of the Clean Water Act (CWA), § 505, 33 U.S.C. 1365, waives the sovereign immunity of the United States from assessment of federal civil penalties for violations of the Clean Water Act.

TABLE OF AUTHORITIES

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1. The cross-petition presents two questions: first, whether the RCRA federal facilities provision, RCRA § 6001, 42 U.S.C. 6961,[1] waives federal sovereign immunity from assessment of civil penalties and, second,

[1] The State's first question presented mistakenly refers to the RCRA citizen suit provision, RCRA § 7002, 42 U.S.C. 6972, rather than the RCRA federal facilities provision, RCRA § 6001, 42 U.S.C. 6961. As printed in the cross-petition, that question concerns whether "Section 7002 of [RCRA], 42 U.S.C. 6972, waives the sovereign immunity of the United States from assessment of state civil penalties for violation of state hazardous waste laws." Cross-Pet. i. The State would not have had to file a cross-petition to bring before this Court the question whether RCRA § 7002—the RCRA citizen suit provision—waives federal sovereign immunity from *federal* civil penalties, because that question is already before the Court on our petition for certiorari. See

whether the CWA citizen suit provision, CWA § 505, 33 U.S.C. 1365, waives federal sovereign immunity from assessment of civil penalties.

2. Further review is not warranted with respect to the first question presented in the State's cross-petition. Although the court of appeals was divided on other issues in this case, the court was unanimous (see Pet. App. 9a-12a, 17a n.1) in agreeing with both other courts of appeals that have ruled on the issue that the RCRA federal facilities provision does not subject the federal government or its agencies to civil penalties. See *United States* v. *Washington*, 872 F.2d 874 (9th Cir. 1989); *Mitzelfelt* v. *Department of Air Force*, 903 F.2d 1293 (10th Cir. 1990). Moreover, as we note in our petition (90-1341 Pet. 25), all but two district courts that have reached the issue have also disagreed with the State's position. The only two exceptions are the district court in this case, whose holding on the issue was reversed by the Sixth Circuit, and one other district court whose decision is now pending on appeal in the First Circuit.[2] See

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Pet. i. Moreover, the State has not previously in this litigation asserted that Section 7002 waives federal sovereign immunity from *state* civil penalties, and we do not see how Section 7002 could be read to do so. Finally, the State does not discuss Section 7002 in the body of its cross-petition, but instead discusses RCRA § 6001—the RCRA federal facilities provision—(see Cross-Pet. 1, 15, 16, 18) and cites (see Cross-Pet. 3, 7) the portion of our petition (at 25) in which cases construing the RCRA federal facilities provision are discussed.

[2] The State asserts (Cross-Pet. 3 n.3) that one district court decision cited in our petition, *Florida Dep't of Envtl. Regulation* v. *Silvex Corp.*, 606 F. Supp. 159 (M.D. Fla. 1985), "does not address civil penalties at all." In *Silvex*, the State of Florida sued the United States Navy for "dam-

Maine v. *Department of the Navy*, 702 F. Supp. 322 (D. Me. 1988), appeal pending, No. 86-0211P (1st Cir.).

The arguments advanced by the State in its cross-petition have been specifically rejected by the courts of appeals. For example, the State contends that the RCRA federal facilities provision was drafted to respond to this Court's decisions in *Hancock* v. *Train*, 426 U.S. 167 (1976), and *EPA* v. *California*, 426 U.S. 200 (1976). Those cases held that the federal facilities provisions of the Clean Air Act and Clean Water Act did not waive federal sovereign immunity from state permit requirements. As the Ninth Circuit recognized in *Washington*, however, the fact that Congress intended to respond to the decisions in *Hancock* and *EPA* v. *California* merely explains "the inclusion of the word 'permits' in section 6961." 872 F.2d at 878.

More generally, the history of RCRA indicates that Congress intended to subject federal agencies to "requirements" to which the waivers of immunity before the Court in *Hancock* and *EPA* v. *California* did not extend. That history does not, however, demonstrate that Congress intended to waive sovereign immunity with respect to civil penalties, the specific

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ages," as well as injunctive relief, for an alleged hazardous waste spill by a Navy contractor. 696 F. Supp. at 161. The court held that the term "requirements" in RCRA's federal facilities provision should be defined "as synonymous with state objective regulations," 696 F. Supp. at 163, and that the state statutes under which damages were sought did not impose "requirements" within the meaning of the statute. The court thus adopted an interpretation of the term at issue—"requirements"—that is inconsistent with the State's theory that that term includes monetary damages or civil penalties.

issue raised by this case. See *Washington*, 872 F.2d at 878-879; *Mitzelfelt*, 903 F.2d at 1295-1296. As the Tenth Circuit observed in *Mitzelfelt*, "[t]he legislative response in RCRA to *Hancock* and [*EPA* v. *California*] was narrow, and did not extend the waiver far beyond what had been waived in previous statutes." 903 F.2d at 1296.

The State also argues that the RCRA federal facilities provision requires the federal government to comply with "all * * * requirements," and that in common usage the term "requirements" includes civil penalties. Cross-Pet. 15. The Sixth Circuit in this case, however, noted that that interpretation cannot be squared with the Clean Water Act's federal facilities provision, which differs from the comparable RCRA provision. As the court pointed out, the State's argument that "requirements" includes "sanctions" would render the CWA's reference to "sanctions" superfluous.[3] Pet. App. 11a. The court also noted that the RCRA provision "explicitly discusses injunctive relief twice, but never mentions monetary relief

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[3] Indeed, the State itself has consistently argued in the court of appeals and in its brief in opposition in this Court that the term "sanctions"—not the term "requirements"—in the CWA federal facilities provision waives federal sovereign immunity from civil penalties. See Br. in Opp. 14-15; Ohio C.A. Br. 19-25. In the corresponding RCRA provision, however, the term "sanctions" plainly refers to the mechanism for enforcing injunctive relief, not to civil penalties. Therefore, in contrast to its position with respect to the CWA, the State argues that the term "requirements" in the *RCRA* federal facilities provision effects a waiver of sovereign immunity from civil penalties. The State's contrary positions with respect to the same term in the two statutes are an apt demonstration that the terms used are at best ambiguous and hence cannot be construed as waivers of sovereign immunity from civil penalties. See Pet. 15-16.

or civil penalties" (*ibid.*), and thus "appears to omit civil penalties too neatly to be an accident." *Id.* at 12a; accord *Washington*, 872 F.2d at 877. The statutory language therefore reasonably conveys Congress's intent to "includ[e] substantive standards and the means for implementing those standards, but exclud[e] punitive measures." *Mitzelfelt*, 903 F.2d at 1295.

3. The second question presented in the cross-petition is whether the citizen suit provision of the CWA, § 505, 33 U.S.C. 1365, should be construed to subject federal instrumentalities to federal civil penalties under the CWA itself. Because it apparently found the issue moot in light of its disposition of the other issues in this case, the court of appeals did not reach it. See Pet. 11 n.6.

Only one court of appeals has directly addressed this issue. In *Sierra Club* v. *Lujan*, No. 90-1183 (Apr. 30, 1991), the Tenth Circuit recently agreed with the State's contention in this case that civil penalties may be assessed against the federal government under the CWA citizen suit provision. Slip op. 15-17. One district court has reached a contrary conclusion. *McClellan Ecological Seepage Situation (MESS)* v. *Weinberger*, 655 F. Supp. 601, 605 (E.D. Cal. 1986).

As the State points out (Cross-Pet. 19), the CWA citizen suit provision "uses waiver language virtually identical to that of the RCRA citizen suit provisions." The second question presented in our petition is whether the RCRA citizen suit provision waives federal sovereign immunity from federal civil penalties. In light of the similar language used in the RCRA and the CWA citizen suit provisions, resolution by this Court of the second question presented in our petition is likely to provide the lower courts with substantial guidance concerning the meaning of the cor-

responding CWA provision. Therefore, although we believe that the Court may not find it necessary to add to the complexity of this case by granting certiorari on the second question presented in the State's cross-petition, we do not oppose further review with respect to that question.

It is therefore respectfully submitted that the cross-petition for a writ of certiorari should be denied as to the first question presented.

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Solicitor General

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